No. 3926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY KOCKOS and ANDREW KOCKOS, copartners doing business under the firm name and style of Kockos Bros. and KOCKOS BROS. (a partnership),

Plaintiffs in Error,

vs.

C. ITOH & CO., LTD. (a corporation),

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN S. PARTRIDGE,
RAYMOND PERRY,
Attorneys for Plaintiffs in Error.

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This is an appeal of Harry Kockos (et al.) from the judgment on verdict of the Southern Division of the United States District Court of the Northern District of California, Second Division, in favor of defendant in error and against plaintiffs in error.

Statement of the Case.

The parties to this action entered into a merchandise contract, wherein the defendant in error sold,

and the plaintiffs in error purchased, approximately 100 tons Chinese shelled peanuts, 40 count average. The contract (page 3) provided that the "Seattle Chamber of Commerce Certificate of Inspection final as to crop, count, quality and condition."

Defendants in error alleged that it

> "has in all respects complied with the terms and conditions of the aforesaid contract on its part to be performed and upon arrival of said peanuts from the Orient in early March, 1920, tendered and offered to deliver to the said defendants the said 100 tons of Chinese shelled peanuts as described in the aforesaid contract and the said defendants inspected and examined the same and after such inspection and examination, the said defendants requested the plaintiff to ship the same to Chicago, Illinois, from Seattle, Washington" (page 4).

Plaintiffs in error denied that plaintiff has in all respects, or in any way, or at all, complied with the terms and conditions of the contract on its part to be performed. They denied that plaintiff tendered or offered one hundred tons Chinese shelled peanuts as described in the contract, or any peanuts of 40 count average. They alleged that upon the representation of the plaintiff that the peanuts were of 40 count average, they gave the shipping instructions.

That when defendant in error presented its invoice for 38/40 count peanuts with the Seattle Chamber of Commerce Certificate of Inspection, the plaintiffs in error for the first time discovered that

the count of the peanuts tendered were an average of 37 count (pages 16 and 17).

By way of special defense plaintiffs in error set up that the contract was for 40 count average and that the Seattle Chamber of Commerce Certificate of Inspection was final as to crop, count, quality and condition. That they refused delivery upon ascertaining that the Seattle Chamber of Commerce Certificate specified the count to be 37 (page 20).

Issue.

This appeal presents the following issues:

1st. Is a contract, providing for a Chamber of Commerce Certificate final as to count, binding upon both parties?

2nd. Did the trial court err in refusing to grant the motion for non-suit upon the ground that the evidence established that the defendant in error did not comply with the contract in that it tendered goods of a different count from those which the contract called for?

3rd. Did the trial court err in refusing to grant a non-suit as to the 400 bags of peanuts which did comply with the contract, when the evidence established that plaintiffs in error offered to accept the 400 bags and that defendant in error refused to deliver them? (page 84).

4th. Did the trial court err in admitting testimony to establish a custom to vary the terms of a written contract?

5th. Was there a waiver by plaintiffs in error?

Points and Authorities.

I.

A CONTRACT FOR 40 COUNT AVERAGE, CHAMBER OF COMMERCE CERTIFICATE FINAL AS TO COUNT, IS BINDING UPON BOTH PARTIES.

In *California Sugar etc. Agency v. Penoyar,* 167 Cal. 274 at page 279, the State Supreme Court said:

> "The contract provided in express terms that the decision of Hollihan or such other grader as might be designated should 'be final and conclusive upon the parties' with respect to the grades of the lumber. Nothing is better settled than the rule *that where the parties agree that the performance or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding in the absence of fraud or mistake.* (9 Cyc. 617; Palmer v. Clark, 106 Mass. 373; Nofsinger v. Ring, 71 Mo. 149, 36 Am. Rep. 456; Moore v. Kerr, 65 Cal. 517, 4 Pac. 542; Dunstan v. McAndrew, 44 N. Y. 72; City St. Imp. Co. v. Marysville, 155 Cal. 419, 101 Pac. 308; American Haw. E. & C. Co. v. Butler, 165 Cal. 497, 133 Pac. 280.) The 'mistake' which will justify an impeachment of the arbiter's decision is not mere error of judgment, but is the kind of mistake which 'amounts to fraud'."

In the case of *Standard Oil Co. v. VanEtten,* 107 U. S. 327-330, the Supreme Court affirmed a judgment approving of the same doctrine. The court stated:

> "The Court charged the Jury, in substance, that, by the terms of the contract, as modified on April 1, 1874, the heading became the property of the Standard Oil Company, on delivery at Lapeer on land leased by it, but subject to their inspection and count at Cleveland; *that, if that count was made fairly and in the exercise of the best judgment of the inspector, it would be binding on the plaintiff,* unless its variance from the actual truth was too great to be accounted for by any error of Judgment, in which case the plaintiff was not precluded from showing a mistake; that if upon all the evidence, the jury should be unable to determine whether there was fraud or mistake in the count upon either side."

In the case at bar defendant in error made no attempt to prove fraud or mistake. Therefore, the Seattle Chamber of Commerce Certificate was final and binding upon both of the parties.

The trial court, therefore, erred when it refused to give either of the two instructions requested by plaintiffs in error declaring the certificate to be final and binding upon defendant in error.

II.

REFUSAL TO GRANT THE NON-SUIT (1600 BAGS).

The evidence having clearly established that the count on 1600 bags was 37—the Seattle Chamber of

Commerce Certificate having established that fact—the court should have granted the non-suit.

The tender of a larger count, even though it might be considered a better grade of peanut, cannot constitute performance of the contract.

In the case of *Norrington v. Wright,* 115 U. S. 188-203, the Supreme Court stated:

> "A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which the term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn v. Burness, 3 B. & S. 751; Bowes v. Shand, 2 App. Cases 455; Lowher v. Bangs, 2 Wall. 728, 69 U. S. bk., 17 L. ed. 768; Davison v. Van Lingen, 113 U. S. 40."

In the instant case the count was a material part of the contract, and a third parties' inspection was made final. Defendant in error, therefore, failed to perform a condition precedent on its part to be performed.

On page 208 the court quotes Lord Chancellor Cairns:

> "It does not appear to me to be a question for your Lordships, or for any court to consider whether that is a contract which bears upn the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile

> contract, and the merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance. * * * Plaintiff who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfillment of the contract."

In quoting Lord Blackburn on page 209 the court says:

> "If the description of this article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. * * * But the parties have chosen for the reasons best known to themselves to say: We bargained to take rice shipped in this particular region at that particular time on board that particular ship, and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."

In the case of *Pacific W. C. Co. v. Western W. D. Co.,* 41 Cal. App. 696 at page 700, the appellate court declared:

> "A buyer cannot 'be required to accept and pay for a thing different from that which he contracted to receive'. 'If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to

recover the price as money had and received for his use.' ''

In the case of *Vassau v. Campbell,* 81 N. W. 829 at page 830, the Supreme Court of the State of Minnesota stated:

> "It must be held that the parties contracted with reference to this term as generally understood, and, so construed, the defendants agreed to deliver at least 50 head of cattle—steers and heifers—averaging in age from 10 to 18 months. A bunch of 50 cattle was in fact tendered, but less than a fourth were over 10 months old, and six of these were bulls. This would not be a compliance with the terms of the contract. So many 10 months cattle, but little better than calves, did not constitute in the whole bunch a fair average; and as further provided by the contract, and held by the court in the charge, the furnishing of the bulls instead of heifers or steers did not meet the requisites of the contract either. It is true that the defendants offered six two year olds in the place of the bulls, but the plaintiffs might have had their own reason for demanding a strict compliance with the contract, and they had a right to insist on the same against a different compliance in any respect which defendants were trying to make."

Therefore plaintiffs in error were entitled to the article contracted for, to-wit: 40 count average. Defendant in error in making a tender of 37 count failed to perform a condition precedent. The trial court, therefore, erred in refusing to grant the motion for non-suit.

III.

MOTION FOR NON-SUIT (400 BAGS).

The evidence without conflict showed that 400 bags were 40 count; that the defendant offered to accept and pay for these 400 bags. This offer was made unconditional. In defendants in error's exhibit No. 19 (page 47) plaintiffs in error wired "five hundred sixty bags in order with contract". In defendants in error's exhibit No. 25 (page 51) plaintiffs in error wired:

> "We understand from the documents you have presented us there was a portion forties and if there is present documents immediately and if they are in order we will take up draft at once."

Mr. Crandall, the traffic manager for defendant in error at Seattle, testified on cross-examination (page 62) as follows:

> "Kockos Bros. offered to receive and pay for the 400 bags of 38/40's but the offer was refused. They were notified to pay for the entire contract or pay damages."

Even though the trial court on the motion stated (page 88):

> "I will say to you, Mr. Brownstone, my impression is rather against you on that, but I will hear you a little further. I have difficulty in seeing why you should be unwilling to deliver the 400 bags if the offer to take them was unconditional. * * * The motion will be denied, but as I say, without prejudice to a reconsideration of the question when it comes to instruct-

> ing the jury what the measure of damages will be."

The instruction as to damages appears on pages 116-117. No restriction was mentioned at all. The jury were instructed

> "the party whose contract has not been fulfilled by the other party, should be made whole, and should receive what is reasonably necessary to make him whole, and to give him what he would have received under the contract."

Plaintiffs in error, while they were perfectly willing to take the 400 bags which admittedly complied with their contract, were made to pay the loss of the vendor who held them during a broken market and sold the entire lot two months later upon a greatly weakened market.

There is nothing to support such an unjust award.

IV.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY TO ESTABLISH CUSTOM TO VARY THE TERMS OF A WRITTEN CONTRACT.

Defendant in error produced witnesses to testify that a 40 count contract meant that the peanuts should not run over 40; that 36-38 count would be a good delivery under a 40 count average; that such is the general understanding of the trade.

This testimony was objected to and Exception No. 1 (page 77) and No. 2 (page 78) were taken.

The court instructed the jury:

> "There is that difference, you will see, one party contending that 38-40's fulfilled the contract, and the other party, the plaintiff, contending that not only 38-40's would fulfill it, as is the common understanding, but that even a slightly larger nut, a 36-38, would be regarded as complying with the terms. It is for you to say upon which side of this particular issue the truth lies. If, from the evidence, you believe that, under trade customs and practice, the parties, when they entered into this contract, intended and understood that it called for a 40 count average, and that it was merely a limit upon the smallness, that it couldn't be smaller than 40, and that it would be satisfied by 38-40's, and also 36-38's, a slightly larger nut, then you will find for the plaintiff, for, in that contingency, it is submitted that the plaintiff tendered such a nut as was called for by the contract, that is, upon the assumption that it means 36-38's as well as 38-40's." (Page 115.)

As their third ground of the motion for non-suit, plaintiffs in error specified that where there are specific terms in a contract, limiting and defining the quality of the goods which are the subject of the contract, any custom inconsistent with the terms of that contract is not a proper subject matter of investigation, nor will it support an action based upon that contract.

In *Leonhardt v. Calif. Wine Assn.*, 5 Cal. App. 19-23, appellate court stated:

> "The alleged custom would have limited the deliveries to one or two loads a day, and in that respect would have been inconsistent with the

written contract. A custom inconsistent with the terms of a written contract is not the proper subject matter of a defense. In the case of Withers v. Moore, 140 Cal. 591, 74 Pac. 159, the defendant contended that the contract sued upon was subject to a certain custom. In that case, pages 596, 597 of 180 Cal., pages 160, 161 74 Pac., it is said: 'The contract as made by the cablegrams and explained in the letter is not uncertain with respect to that point in question. It is a positive agreement by the defendant to buy the coal in question of the plaintiff at the price of twenty-four shillings and three pence per ton, to be delivered to him free of any expense of freight, insurance, exchange or duty, all of which were to be paid by the plaintiff. To attach to this contract the custom of San Francisco, the effect of which would be that if the cargo was not received until after July 1, 1894, the defendant would pay thirty-five cents less per ton than the price agreed upon, would be to vary the terms of a written contract by parol evidence. The Code provides that evidence may be given of "usage" to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.' (Code Civ. Proc., sec. 1870, subd. 12.) And in accordance with this principle it has been held that it is not competent to vary a written contract by parol proof of a custom where the contract is certain in its terms. (Holloway v. McNear, 81 Cal. 156 [22 Pac. 514]; Milwaukee Co. v. Palatine Co., 128 Cal. 74 [60 Pac. 518]; Ah Tong v. Earl Fruit Co., 112 Cal. 68 [45 Pac. 7]; Burns v. Sennett, 99 Cal. 363 [33 Pac. 916].)"

We submit that the rule declaring "It is not competent to vary a written contract by parol proof of

a custom where the contract is certain in its terms" is controlling, and clearly establishes the error committed.

V.

WAIVER.

Defendant in error attempted to show a waiver by plaintiffs in error of the count because they had received a report of an inspector that his inspection showed 37 count. Defendant in error knew nothing of this report pending the transaction.

The testimony of George B. Graham (pages 63 to 66) shows that on March 10, 1920, his firm was requested by plaintiffs in error to inspect; that the telegram of March 10, 1920, Plaintiffs' Exhibit No. 29 was their report; that Itoh & Co. knew nothing of its work for Kockos Bros. during the month of March 1920.

Defendant in error throughout all its correspondence referred to the lot as 40 count. This was established by, Plaintiffs' Exhibit No. 4 (page 32) advising that the shipment left the Orient, Plaintiffs' Exhibit No. 5 advising of the arrival of the goods and Plaintiffs' Exhibit No. 9 asking for shipping instructions. After the Chamber of Commerce issues its certificate, Plaintiffs' Exhibit 13-B (page 40) for 37 count, on March 13, 1920, defendant in error continued to call the goods 40 count. Its invoice, Plaintiffs' Exhibit No. 17 (page 45), issued March 22, 1920, declares the 1600 bag lot to be 38/40 count.

Plaintiffs' Exhibit No. 18, a letter of March 27, 1920, called the count "forty".

When the documents were presented to plaintiffs in error in San Francisco on March 20, 1920, they ascertained for the first time that the Chamber of Commerce Certificate was for 37 count and immediately rejected the tender. See Plaintiffs' Exhibits No. 19 (page 47) and 22 (pages 49 and 50).

On cross-examination Mr. Kockos testified (pages 103 to 106) that he did not pay much attention to Graham's report of the count because the contract called for Chamber of Commerce Certificate to be final on the count.

Defendant in error claims that plaintiffs in error waived the right to object, even though defendant in error was cognizant of the fact at the time. It claims a waiver though the contract provides a third party's certificate should be final upon the subject. It claims a waiver even though, after obtaining knowledge of the defect, it failed to communicate that information to the other party. It claims a waiver even though after knowledge of its own breach it refers to the goods as 38/40, those called for by the contract. Is that the law of waiver?

The court throughout the instructions called the jurors' attention to the question of waiver.

> "In such case the burden is upon the plaintiff to show, by a preponderance of the evidence, that it tendered substantially what the contract calls for, or, if it did not tender precisely what the contract calls for, that the defendant waived

its right to reject the offer, and in fact accepted the tendered article in fulfillment of the contract * * *.

It must tender what it contracted to deliver unless, as already suggested, the defendant, with full knowledge of the facts, waives the objection and accepts the substituted article (page 113).

If, upon the other hand, you find that the 36-38's did not meet the clause of the contract as it was understood by both parties when it was entered into, and by the custom and practice of the trade, to which I have adverted, then you will consider plaintiff's contention of a waiver and acceptance by the defendant. (Page 115.)

The purchaser under a contract, who has the right to demand goods of a certain class or quality, may waive some defect or objection upon that ground and accept the goods of a somewhat different type or quality, in fulfillment of the contract. You have heard the testimony upon this point, and the discussion of counsel, tending to illuminate it; and you will say whether or not, with knowledge of the facts, the defendant did in fact waive such objection, if any there might be upon this ground, and did in fact accept the tendered nuts as being in full compliance with the obligations of the plaintiff to deliver under the contract. If you find that such an acceptance was in fact and intelligently made, then the defendant would be bound just the same as if such nuts were originally agreed upon." (Page 116.)

In the first place, there could be no waiver by plaintiffs in error until they received or were notified that the Chamber of Commerce Certificate was

37 count. The time of a breach of contract means the time when the breach was discovered.

Shearer v. Park Nursery, 103 Cal. 415;
Germain Fruit Co. v. Armsby, 163 Cal. 585-590.

Second: There can be no waiver of any right by a purchaser unless that waiver is made known to the seller and causes the seller to be misled or prejudiced by the acts of the buyer. The reason for this rule is to give the seller an opportunity of correcting the mistake or to tender the right thing where he has tendered the wrong thing.

23 *Ruling Case Law* 1435;
Kofoed v. Gordon, 122 Cal. 314-320.

Even though Graham had reported a 37 count, the Chamber of Commerce Certificate might have shown a 38/40 count. If it had, there would have been no breach.

The alleged waiver was not known by defendant in error. It suffered no loss nor was it prejudiced thereby. The testimony clearly shows that, even after it knew the Chamber of Commerce Certificate was for 37 count, it did not notify plaintiffs in error. That with this certificate in its possession it sent the telegram of March 15, 1920, Plaintiffs' Exhibit No. 9 (page 36), asking for shipping instructions. Had it wired at that time that the count was 37, it would never have had shipping instructions.

The record discloses no ground for the application of the doctrine of waiver, and the court erred in

presenting the question of waiver to the jury, especially since the court refused plaintiffs in error instructions upon the law of waiver.

Conclusion.

Plaintiffs in error therefore submit that the errors pointed out herein show that they failed to receive a fair trial upon the law. That the record does disclose a miscarriage of justice.

Therefore, they respectfully submit that the judgment should be set aside and vacated.

Dated, San Francisco,
February 10, 1923.

Respectfully submitted,
JOHN S. PARTRIDGE,
RAYMOND PERRY,
Attorneys for Plaintiffs in Error.